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Case No. 09-1503

IN THE

Supreme Court of the United States

THE CADLE COMPANY, *et al.*,

Petitioners,

v.

KERRY R. HICKS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF

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"[A]rbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1773 (2010) (citation omitted). Consistent with this fundamental principle, a dispute arising after termination of a contract with an arbitration clause is arbitrable "only where [that] dispute has its real source in the contract." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 205 (1991). Lower courts have struggled to apply this precedent, however, and in the decision below, the Court of Appeals disregarded it. As a result, Petitioners were forced to arbitrate a dispute that neither they, nor Respondent Kerry Hicks, agreed to arbitrate. In attempting to shift attention away from the lower court's error, and to minimize the importance of this issue, Respondent mischaracterizes the record and the law. Petitioners respectfully submit that this Court should grant certiorari.

I. The Tenth Circuit's Failure to Apply *Litton* Warrants Review.

Respondent waits until the end of his Brief in Opposition (BIO) to address *Litton*, and his arguments are untenable.

A. This Is a Postexpiration Case.

Respondent first claims that this is not a postexpiration case, which means *Litton* does not apply. *See* BIO 30-32. This argument, which Respondent makes for the first time to this Court, is refuted by the record.

The arbitration clause at issue expressly limits its applicability to controversies or claims "between or among the parties hereto." (Aplt. App. 110 ¶17; Aplt. App. 119 ¶15) (capitalization omitted); *see also*

id. (referring to "any party to this instrument"); Petition for Certiorari ("Pet.") 5 (quoting the Promissory Note's arbitration clause). Respondent alternatively omits the "parties hereto" limitation when quoting the arbitration clause, *see* BIO 30, or makes the remarkable assertion that it imposes "no temporal limit on when the parties have to be parties in order to invoke the Arbitration Provision." BIO 24; *see also* BIO 31-32. But the clause says that arbitration is required of "parties hereto," not of any party who "was or is currently a party to the Promissory Note," as Respondent would prefer. *See* BIO 21. It is axiomatic that, when parties terminate their contractual relationship as they did here, the obligations the contract imposed ordinarily terminate as well. *See, e.g.*, *Litton*, 501 U.S. at 207. And, contrary to Respondent's perplexing suggestion, *see* BIO 31, 35, 36, contracts may of course be terminated through means other than the expiration dates commonly found in collective bargaining agreements.

Respondent previously recognized these settled principles. In resisting arbitration of the claims now at issue (the Arbitration II claims), Respondent stated:

> [The arbitration] provision includes all claims arising while the plaintiff and defendant were "parties hereto," *i.e.*, as long as one of the parties was the maker and the other a holder of the note. . . . To hold otherwise would render the arbitration provision absurdly overbroad. It would mean that Mr. Hicks is forever bound to arbitrate any and all claims

> that arise between him and [Petitioners] in perpetuity.

(Aple. Supp. App. 46).

Even after Respondent switched positions with respect to arbitrability, Respondent continued to recognize that the Arbitration II claims arose postexpiration. He argued that the claims were nonetheless arbitrable based on an asserted presumption in favor of postexpiration arbitrability. *See* Answer and Cross-Appeal Brief of Kerry R. Hicks at 35. The courts below likewise recognized that this is a postexpiration case, finding the Arbitration II claims arbitrable based on that same presumption. *See* App. 10a-11a (Court of Appeals); 37a (district court).

B. The Tenth Circuit Disregarded *Litton*.

Because this is a postexpiration case, it is governed by *Litton*, which holds that the presumption in favor of postexpiration arbitrability "appl[ies] *only* where a dispute has its real source in the contract." *Litton*, 501 U.S. at 205 (emphasis added). As just discussed, the courts below relied on a presumption in favor of postexpiration arbitrability, but they did so without acknowledging, much less applying, *Litton*'s three-part test for determining whether a postexpiration dispute has its real source in the contract.

Respondent asserts that the Tenth Circuit concluded *Litton* was inapplicable here, and acknowledges that "the Tenth Circuit did not analyze each of the *Litton* factors." BIO 29, 32. Nonetheless, Respondent also claims that the Tenth Circuit

performed the "exact[] analysis" required by *Litton*. BIO 33. Respondent is clearly incorrect.[1]

First, Respondent misrepresents what the Tenth Circuit said. The italicized language in the following sentence from Respondent's brief does not appear in the decision below: "The Tenth Circuit explained that the Petitioners' 'continuous course of wrongful conduct *was so related to the Note that resolution of the issue of Petitioners' liability for the claims asserted could not be determined independent of the Note.*'" BIO 33 (misquoting App. 10a) (emphasis added).

The Tenth Circuit did state that the postexpiration dispute in this case was "'directly tied to the note,'" BIO 33. This unsupported statement is, however, not a substitute for the three-part *Litton* analysis.

Under the first *Litton* factor, the Arbitration II claims are not arbitrable because those claims are not based on events or occurrences that happened during the contractual relationship between Respondent and one of the Petitioners. *Litton*, 501 U.S. at 206. Rather, those claims are based on subsequent letters written by Petitioner William Shaulis ("the Shaulis letters"), which suggested Mr. Hicks may have committed bank fraud when he entered into the Promissory Note with Bank of America. *See* Pet. 7-8, 16. As Respondent has previously recognized, his

[1] Respondent emphasizes that the Tenth Circuit "even cited to *Litton*," but, as Respondent must acknowledge, the Tenth Circuit did so only with respect to a general background principle. *See* BIO 32; App. 9a.

Arbitration II claims "arose independent of the Note," and the parties did not agree to arbitrate them. (Aplt. App. 296); (Aple. Supp. App. 43-48).

Respondent now claims that the first *Litton* factor permits arbitration because the Shaulis letters referenced an event that occurred prior to the end (indeed prior to the beginning) of the contractual relationship between Respondent and one of the Petitioners. *See* BIO 34. But *Litton* plainly does not allow postexpiration arbitration whenever a party makes reference to something that occurred preexpiration. *See Litton*, 501 U.S. at 209-10 (holding that a postexpiration dispute was not arbitrable where the union, in arguing in favor of arbitrability, referenced events that occurred preexpiration). Rather, the question under *Litton* is whether the postexpiration dispute "has its real source in the contract" between the parties. *Litton*, 501 U.S. at 205. Here, Respondent's claims based on the Shaulis letters have nothing to do with the parties' prior contractual relationship—Mr. Shaulis could have written the very same letters and Mr. Hicks could have brought the very same claims if the parties never had a contractual relationship.

Under the second *Litton* factor, the Arbitration II claims are not arbitrable because they are based on alleged torts arising out of the Shaulis letters, and not on "a right that accrued or vested under the agreement," *Litton*, 501 U.S. at 206. *See* Pet. 17. Respondent argues that the second factor permits arbitration because "Mr. Hicks had a right to be free from unfounded and malicious allegations of bank fraud at the time he signed the Note." BIO 34. But as Respondent's own description of that right makes

clear, it is not a contractual one, much less one that accrued during the contractual relationship between Respondent and one of the Petitioners.

Finally, under the third *Litton* factor, the Arbitration II claims are not arbitrable because they do not implicate a disputed contractual right that "under normal principles of contract interpretation . . . survives expiration of the remainder of the agreement," *Litton*, 501 U.S. at 206. *See* Pet. 17-18. Respondent claims otherwise only by repeating his meritless argument that the Note imposed a perpetual obligation to arbitrate. *Compare* BIO 35 *with* Part I.A, *supra*.

In sum, this is not a case where the Court of Appeals "[m]isappli[ed] a properly stated rule of law," BIO 35. It is a case where that court failed to recognize the controlling rule of law on an important federal issue. Certiorari is therefore warranted. Sup. Ct. R. 10(c); *see* Pet. 18, 31-32.

C. The Circuits Are Split About How to Apply *Litton*.

Respondent boldly claims "there is no circuit split regarding application of the *Litton* test." BIO 35 (capitalization omitted). But the sharp split discussed in the Petition, *see* Pet. 18-22, has been recognized by the courts of appeals themselves.

After the Eighth Circuit interpreted the first *Litton* prong to mean "our inquiry is limited to determining whether any of the facts and circumstances leading to the relevant grievances arose before termination," *Trinidad Corp. v. Nat'l Maritime Union of Am.*, 81 F.3d 769, 773 (8th Cir. 1996), the Sixth Circuit considered and rejected "the

holding in *Trinidad*." *South Central Power Co. v. Int'l Bhd. of Elec. Workers, Local Union 2359*, 186 F.3d 733, 740 (6th Cir. 1999). The Sixth Circuit instead held that the issue is whether "a majority of the material facts and occurrences arose before the expiration of" the contract. *Id.*[2] The Ninth Circuit, in turn, considered and expressly rejected the Sixth Circuit's approach. *See Operating Eng'rs Local Union No. 3 v. Newmont Mining Corp.*, 476 F.3d 690, 693 (9th Cir. 2007). The Ninth Circuit held that poststexpiration disputes could be arbitrable so long as the "preexpiration facts or occurrences [are] of *some* significance in the dispute." *Id.*

Respondent argues these decisions are "fact-sensitive." BIO 40; *see also* BIO 36-39. But the circuit split is not about facts, it is about three sharply different legal tests for assessing the facts. And, contrary to Respondent's assertion, *see* BIO 36, the fact that the underlying contract here is not a collective bargaining agreement creates no vehicle problem. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. ___ (2010), slip op. at 8 n.6 (noting that "precedents applying the FAA [Federal Arbitration Act] . . . employ the same rules of arbitrability that govern labor cases"). This Court should grant certiorari to resolve the division among

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[2] It is of course true that *Trinidad* examines whether any relevant fact (as opposed to any irrelevant fact) occurred preexpiration, *see* BIO 37, 38, but that does not minimize the difference between *Trinidad* and *South Central*, which examines whether a majority of the material facts occurred preexpiration.

the circuits on this important issue. *See* Sup. Ct. R. 10(a); Pet. 18-22, 31-32.

II. The Conflict Between the Decision Below and *Stolt-Nielsen* Also Warrants Review.

The conflict between the decision below and this Court's recent decision in *Stolt-Nielsen* provides an additional reason to grant merits review, or to grant certiorari, vacate the judgment below, and remand for further proceedings (GVR). *See* Pet. 22-30. Respondent's contrary arguments, *see* BIO 12-29, are once again unavailing.

A. Respondent Misapprehends the Significance of *Stolt-Nielsen*.

Stolt-Nielsen forcefully reaffirms the "foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 130 S.Ct. at 1775. As Respondent emphasizes, the Tenth Circuit said that it recognized this principle. *See* BIO 13. But, in two respects, the Court of Appeals clearly failed to *apply* this principle consistently with *Stolt-Nielsen*.

First, the Tenth Circuit enforced mandatory arbitration even though Respondent acknowledged that he "never agreed to arbitrate" the Arbitration II claims. (Aple. Supp. App. 48); *see* Pet. 16. Under *Stolt-Nielsen*, courts may not require arbitration when the parties acknowledge they had not agreed to it. *See* 130 S.Ct. at 1770, 1776 & n.10; Pet. 25.[3]

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[3] And, notwithstanding Respondent's incorrect judicial estoppel argument, Petitioners did not consent to arbitrate any claims beyond the

Second, *Stolt-Nielsen* holds that "parties may specify *with whom* they choose to arbitrate their disputes." 130 S.Ct. at 1774; *see also id.* ("'Nothing in the FAA authorizes a court to compel arbitration . . . *by any parties* . . . that are not already covered in the agreement.'") (citation and brackets omitted). The decision below conflicts with this holding, because the arbitration agreement in the Promissory Note was limited to existing parties to that Note, yet the Tenth Circuit reflexively and erroneously applied a presumption in favor of postexpiration arbitrability. As a result, the decision below also contravened this Court's even more recent decision in *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. ___ (2010). In *Granite Rock*, the Court held that general presumptions in favor of arbitrability cannot be relied upon to require arbitration of disputes that the parties did not agree to arbitrate. *See* 561 U.S. ___, slip op. at 12-13. The Court further explained: "[f]or purposes of determining arbitrability, *when* a contract is formed can be as critical as *whether* it was formed." *Id.* at 13-14. Consistent with these principles, parties cannot be required to arbitrate a dispute that arises *prior* to the formation of a valid arbitration agreement, *see id.* at 14-15, or *after* termination of such an agreement (unless the dispute has its real source in the contract containing that agreement).

Moreover, *Stolt-Nielsen* makes clear that the arbitrator in this case lacked jurisdiction over the individual Petitioners, Daniel Cadle and William Shaulis, for an additional reason. Even if Messrs.

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requirements of the arbitration agreement. *See* Part II.B, *infra*; *see also* Pet. 8-9.

Cadle and Shaulis were agents of The Cadle Company and Buckeye Retirement Co., LLC, Ltd., *see* BIO 23, they were never parties to the Note, *see* Pet. 26. Therefore, "there is [no] contractual basis for concluding that [they] *agreed*" to arbitrate their personal liability, *Stolt-Nielsen*, 130 S.Ct. at 1775. *See* Pet. 26-27. Respondent reaches a contrary conclusion through the same inverted agency analysis employed by the decision below. *See* BIO 21-24. As the Third Circuit explained in a decision Respondent ignores, there is a dispositive distinction between the cases relied on by Respondent, which involved "nonsignatory agents who sought to *invoke* an arbitration agreement entered into by their corporate principal," and cases such as this one, which involve "nonsignatory agents who [seek] to *avoid* their principal's agreement to arbitrate." *Trancinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 224 (3d Cir. 2007) (comparing, *inter alia*, *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993) with *Bel-Ray Co., Inc. v. Chemrite, Ltd.*, 181 F.3d 435 (3d Cir. 1999)).

Because of the clear conflict between the decision below and both *Stolt-Nielsen* and *Granite Rock*, this Court should grant review or GVR.

B. Respondent's Judicial Estoppel Argument Is Based on a False Premise.

This Court's decision in *New Hampshire v. Maine*, 532 U.S. 742 (2001), does not support a finding of judicial estoppel in this case. *See* Pet. 28-29. Perhaps recognizing as much, Respondent emphasizes that *New Hampshire* indicates that additional fact patterns might also warrant judicial estoppel. *See* BIO 17. Even under Respondent's

theory, however, judicial estoppel is inapplicable because this case does not involve the "unfair advantage [or] unfair detriment" alleged by Respondent. BIO 17.

The sole basis for Respondent's judicial estoppel argument is that, in January 2005, Petitioners joined a motion by Bank of America to stay (not dismiss) Respondent's suit which, at the time, included both postexpiration and preexpiration claims, *see* Pet. 7-8. While a single sentence in Petitioners' joinder motion did state that the arbitration clause in the Promissory Note encompassed all of Respondent's claims, *see* BIO 14, Petitioners never consented to arbitrate any claims not covered by that arbitration clause. (Aple. Supp. App. 30-34.) Moreover, the very next month—and well before Arbitration II proceedings began—Petitioners expressly clarified they had not intended to consent to the arbitrator's jurisdiction through the joinder motion; when Petitioners were nonetheless required to arbitrate, they vigorously contested the arbitrator's jurisdiction. *See* Pet. 9, 29. Thus, this is simply not a case where Petitioners are attempting to "unwind [a request for arbitration] because they lost the arbitration." BIO 20.[4]

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[4] For the same reason, Respondent's waiver argument, *see* BIO 20 n.2, fails. Waiver is found only when a party participates extensively in the merits of an arbitration before objecting. *See Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1279 (9th Cir. 2006) (en banc) (distinguishing *Nghiem v. NEC Elecs., Inc.*, 25 F.3d 1437, 1440 (9th Cir. 1994)).

Even worse, Petitioners were required to arbitrate additional claims that Respondent did not raise until October 2006, which Petitioners could not have consented to arbitrate through their January 2005 joinder motion. *See* Pet. 29-30. Respondent contends the arbitrator only considered new facts in support of Respondent's existing claims, and that the arbitrator had the discretion to make this "purely procedural determination." *See* BIO 25 n.4, 28-29. But Respondent fails to recognize that a "claim" is simply "[t]he aggregate of operative facts giving rise to a[n enforceable] right." Black's Law Dictionary 240 (7th ed. 1999); *accord Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy*, 891 F.2d 414, 418 (2d Cir. 1989). The new allegations Respondent made in October 2006 raised substantial, new operative facts (e.g. alleging, for the first time, that Petitioners defamed Mr. Hicks by making a false allegation of perjury, *see* Pet. 30), and hence constituted new claims. Amending a statement of claims may be a procedural question in many circumstances, but where, as here, it fundamentally changes the nature of the arbitration, it is impermissible absent the parties' consent. *See Stolt-Nielsen*, 130 S.Ct. at 1775, 1776; Pet. 30.

Finally, Respondent also appears to make a law-of-the-case argument in support of judicial estoppel. *See* BIO 15, 20. But "the doctrine of law of the case limits reexamination of a ruling in an earlier stage of a litigation by the same court, not by a higher court." *In re: South Beach Securities*, 606 F.3d 366, 378 (7th Cir. 2010) (Posner, J.) (citing, *inter alia*, *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 881 n.1 (1990)).

For the foregoing reasons, Respondent's effort to defend the involuntary arbitration imposed on Petitioners through a theory of judicial estoppel fails.

III. Conclusion

Petitioners respectfully request that the writ of certiorari be granted.

Respectfully submitted,

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